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November 10, 2010

CELA

Jeff S. Jordan
Supervisory Attorney
Complaints Examination & Legal Administration
Office of the General Counsel
Federal Election Commission
Washington, D.C. 20463

Re: MUR 6405

Dear Mr. Jordan:

Please accept the following response filed on behalf of Kelly for Congress (Committee) and Kristen L. Smith, Treasurer (Respondents). Respondents received a Complaint filed with the Federal Election Commission (FEC or Commission) dated October 28, 2010 but received by them on November 1, 2010. The FEC assigned number MUR 6405 to the Complaint, filed against Respondents by the Democratic Congressional Campaign Committee (DCCC). Jesse Kelly was unsuccessful in his campaign for the 8th Congressional District of Arizona.

This response is submitted to your office within 15 days of receipt of the Complaint in accordance with 2 U.S.C. § 437g(a) and it therefore constitutes a timely response. As discussed herein, the Complaint's legal arguments are simply incorrect. The Commission need not give this matter further investigation or action and the Complaint should be immediately dismissed as it pertains to the Kelly Respondents.

Alleged Violation

The DCCC, in a complaint filed with the FEC just days before the election, argues that a communication paid for by Friends of John McCain, in summary, should be considered "coordinated communications" between Friends of John McCain and Kelly for Congress and "illegal in-kind contributions" from Friends of John McCain to Kelly for Congress in violation of the Federal Election Campaign Act (Act).¹ The DCCC states that Senators McCain and John Kyl "attack Congresswoman Gabrielle Giffords and urge the election of her opponent, Jesse Kelly" in the communication at issue.² The communication at issue is located at <http://www.youtube.com/watch?v=pWYDIJuRYW.w> (visited on November 5, 2010).

Analysis

When a committee, group or individual pays for a communication that is coordinated with a campaign or a candidate, the communication is either an in-kind contribution or, in some limited

¹ MUR 6405 at 3.

² *Id.*

Jeff S. Jordan
November 10, 2010
Page 2 of 3

case, a coordinated party expenditure by a party committee.³ FEC regulations, however, include several exceptions to the definition of coordinated communications. Of specific relevance to this matter is 11 CFR 109.21(g), which states:

(1) A public communication in which a candidate for Federal office endorses another candidate for Federal or non-Federal office is not a coordinated communication with respect to the endorsing Federal candidate unless the public communication promotes, supports, attacks, or opposes the endorsing candidate or another candidate who seeks election to the same office as the endorsing candidate.

The advertisement was a public communication in which a candidate for Federal office (Senator McCain) endorsed another candidate for Federal office (Jesse Kelly) that did not promote, support, attack or oppose the endorsing candidate (Senator John McCain) or another candidate who sought election to the same office as the endorsing candidate (Senator McCain). Therefore, the advertisement squarely falls within the safe harbor under 11 CFR 109.21(g), and does not constitute a coordinated communication. Moreover, as noted in the FEC's *Campaign Guide for Congressional Candidates and Committees* with respect to this regulatory provision:

A public communication in which a federal candidate endorses, or solicits funds for, another candidate for federal or nonfederal office does not result in a contribution to the endorsing (or soliciting) candidate unless the communication promotes or supports the endorsing (or soliciting) candidate or attacks or opposes his opponent in the election.⁴

For the reasons referenced above, the communication therefore also does not constitute a contribution, in-kind or direct, by Friends of John McCain to Kelly for Congress.

Conclusion

The FEC should dismiss the Complaint and find no reason to believe that a violation of the Act or the regulations promulgated thereunder has occurred by Kelly for Congress or Kristen L. Smith, Treasurer, in her official capacity. With respect to Ms. Smith's personal capacity, since no violation of

³ 11 CFR 109.20.

⁴ Federal Election Commission, *Campaign Guide for Congressional Candidates and Committees*, (April 2008) at 41 (citing 11 CFR 109.21(g)).

Jeff S. Jordan
November 10, 2010
Page 3 of 3

law occurred, there could not be a knowing or willful violation of the Act or an intentional deprivation of the operative facts giving rise to the alleged violation. In addition, Mr. Kelly was unsuccessful in his campaign for Congress. Should you have any additional questions with regards to this matter, I may be reached at (202) 558.3452. Thank you.

Sincerely,



Elliot S. Berke

11/10/2010 11:00 AM